STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 3, 2008
v	No. 265463 Oakland Circuit Court
DUANE MONTGOMERY, Defendant-Appellant.	LC No. 2004-199127-FH

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant was charged with willfully preventing a water meter belonging to a water company from being registered, MCL 750.282(1)(b), and willfully injuring a meter belonging to a gas company, MCL 750.282(1)(a). Following a jury trial, defendant was convicted on both counts, and he was sentenced to 60 days in jail and one year probation for each of his convictions. We affirm.

Defendant argues that the district court and circuit court erroneously interpreted MCL 750.282. Further, defendant asserts that the courts abused their discretion in finding that MCL 750.282 applies to West Bloomfield Township. We disagree.

The interpretation of a criminal statute is subject to de novo review. *People v Maynor*, 470 Mich 289, 294; 683 NW2d 565 (2004). The words of a statute are the most reliable evidence of that intent, and in construing a statute a court must consider both the plain meaning of the language and its placement and purpose in the statutory scheme. *People v Gillis*, 474 Mich 105, 114; 712 NW2d 419 (2006). Statutory language must be read in its grammatical context unless it is clear that some other meaning was intended. *Id*. at 114-115. In construing a statute, a court will give effect to every word, phrase, and clause when practicable. *People v Stone*, 463 Mich 558, 565; 621 NW2d 702 (2001).

The applicable provisions of MCL 750.282 provide the following:

(1) A person shall not do any of the following:

> (a) Willfully or fraudulently injure, or fraudulently allow to be injured, a meter, wire, line, pipe, or appliance belonging to a water, steam, electric, or gas company, or propane gas dealer or distributor.

> (b) Willfully or fraudulently prevent a water, steam, electric, gas, or propane gas meter belonging to a water, steam, electric, or gas company, or propane gas dealer or distributor from duly registering the quantity of water, steam, electric current, gas, or propane gas measured through the meter, or in any way hinder or interfere with the meter's proper action or just registration.
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> (4) The provisions of this section shall extend and apply to all offenses against all water, steam, electric, or gas companies, or propane gas dealers or distributors, and boards or municipalities owning or operating plants for producing, manufacturing, furnishing, transmitting, or conducting water, steam, electricity, or gas, either natural, liquefied, or artificial.

In this case, defendant removed a water meter that belonged to West Bloomfield Township. As such, defendant willfully prevented a water company from duly registering the quantity of water through the meter. MCL 750.282(1)(b). Further, defendant's conduct hindered and interfered with the meter's proper action or just registration. MCL 750.282(1)(b). The key inquiry here is whether West Bloomfield Township was a company under MCL 750.282(1)(b). The plain meaning of "company" is "a number of persons united or incorporated for joint action, esp[ecially] for business." *Random House Webster's College Dictionary* (1997).

The water department supervisor testified that West Bloomfield Township purchases its water from the City of Detroit, as a wholesale customer. The water is then piped through a network of "transmissions mains" to eight feed point locations in the Township. Further, the record reflected that the Township controlled the flow of the water to its residents and billed the residents based on their consumption of the water. The Township was engaged in purchasing, transmitting, and distributing water to its residents, for which it charged its residents a fee. On this record, we conclude that West Bloomfield Township was a "company" under MCL 750.282(1)(b), according to the fair import of that term, which promotes justice and effects that statute's objectives. See MCL 750.2.

In reaching this conclusion we reject defendant's argument as a misapprehension of the statutory language. Defendant believes that he can escape liability by operation of MCL 750.282(4), because the Township does not own or operate a water plant. However, MCL 750.282(4) provides clarification to which entities the MCL 750.282 offenses may be committed against. The offenses enumerated in MCL 750.282 shall extend and apply to the following:

> (1) all water, steam, electric, or gas companies, or propane gas dealers or distributors, and
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> (2) boards or municipalities owning or operating plants for producing, manufacturing, furnishing, transmitting, or conducting water, steam, electricity, or gas, either natural, liquefied, or artificial. [MCL 750.282(4).]

As discussed previously, West Bloomfield Township may be properly classified as a water company under MCL 750.282(4). Further, West Bloomfield Township is a municipality, which

owns or operates a plant for furnishing, transmitting, or conducting water under MCL 750.282(4). The plain meaning of "plant" includes "the equipment, machinery, tools, etc., necessary to carry out any industrial business." *Random House Webster's College Dictionary* (1997). The water department supervisor's testimony supports a position that the Township, at the least, operates a "plant" that furnishes, transmits, and conducts water. As such, defendant's argument lacks merit.

Although the trial court reached the correct conclusion, its reasoning was flawed. The trial court ruled that:

> Under the plain terms of the statute, the offense is committed if the defendant has prevented a water meter belonging to a producer or distributor from properly registering the amount of water. MCL 750.282(1)(b). The offense has no element requiring that the victim be a municipality which owns a water purification plant.

The trial court implicitly concludes that the Township was a "producer or distributor." After reviewing the language of MCL 750.282(1)(b), we conclude that the trial court's classification of the Township as a "producer or distributor" was erroneous. Based on the language of the statute, the legislature was including two classifications of "owners" of meters: (1) water, steam, electric, or gas companies or (2) propane gas dealers or distributors. The statute makes reference of dealers and distributors only in the connection with propane gas. Thus, the statute does not expressly reference water distributors. Further, the trial court's characterization of the Township as a water producer is not accurate. The Township can be a water producer only in the sense that it furnishes or supplies water to its residents. See *Random House Webster's College Dictionary* (1997). However, the statute also includes "furnishing," so it can be reasonably inferred that "producing" was being used to mean "to cause to exist" in the statute. *Id*. Nevertheless, as discussed previously, the Township may be properly classified as a water company or a municipality, which owns or operates a plant for furnishing, transmitting, or conducting water. Although based on the wrong reason, a decision of a trial court which reached the correct result will be affirmed on appeal. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005).

Next, defendant argues that the circuit court erroneously concluded that a magistrate met the statutory requirements of MCL 600.8507(1). Defendant asserts that the magistrate failed to post bond. We disagree.

MCL 600.8507(1) provides in pertinent part:

> Before assuming office, persons appointed magistrates shall take the constitutional oath of office and file a bond with the treasurer of a district funding unit of that district in an amount determined by the state court administrator.

However, MCR 8.204 provides that magistrates "must file with the chief judge a bond approved by the chief judge." The court rule supersedes the statute in this case, because it is a matter of court practice and procedure. See MCR 1.103; MCR 1.104; *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 722; 575 NW2d 68 (1997). The record reflects that a bond was posted for the magistrate in question.

In arguing his motions to suppress and dismiss, defendant challenged the validity of the magistrate's appointment. Defendant provides almost no evidence, other than an unresponsive Freedom of Information Act request, and cites no authority to support his position. Significantly, defendant included in one of his numerous motions a copy of the magistrate's official bond and oath from the Michigan Municipal League Liability and Property Pool. The document provides:

> In consideration of the premium paid and subject to the terms and conditions of this coverage, the Michigan Municipal League Liability and Property Pool agrees to indemnify the [district court] for any loss of money or other tangible property belonging to the [district court] through any fraudulent or dishonest act or acts by an employee occupying the position in this endorsement [the magistrate was listed thereafter].

The record clearly refutes defendant's assertion. At the preliminary examination, the trial court indicated "I am looking at a document, which indicates a bond was paid in reference to [the magistrate]." Additionally, defendant attacks the trial court's interpretation of MCL 600.8507, as invalidating the statute. These arguments are without merit because the trial court did not interpret the statute, but concluded that the magistrate's bond was timely posted. We conclude that the trial court merely ruled that a bond was posted for the magistrate, which was sufficient to comply with MCR 8.204. In reaching this conclusion, we also reject defendant's argument that the trial court has interpreted MCL 600.8507 in such a way as to use public funds to pay a private debt. The argument is advanced without citation of authority; thus, this Court will not review this claim. See *People v Conner*, 209 Mich App 419, 430; 531 NW2d 734 (1995).

Defendant argues that the prosecution failed to disclose evidence. Defendant devotes only cursory attention in his brief to this issue without citation to authority. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims; nor may he give issues cursory treatment with little or no citation of supporting authority. See MCR 7.212(C)(5); *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *Conner, supra*.

Next, defendant argues that the district court and circuit court abused their discretion by admitting evidence seized pursuant to an allegedly invalid search warrant. We disagree. A trial court's findings of fact regarding a motion to suppress evidence are reviewed for clear error, but the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference, and the trial court's ultimate ruling is reviewed de novo. *People v John Lavell Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

Defendant raised a number of arguments attacking the sufficiency of the search warrant in his motion to suppress, and then recycled them in his motion to dismiss. The underlying record does not support defendant's arguments, and defendant rarely cites authority to support his tenuous arguments. Defendant raised the same five arguments throughout these proceedings in attacking the validity of the August 19, 2004, search warrant: the magistrate did not meet statutory requirements; the magistrate did not have the authority to issue a search warrant without direction from a district judge; the magistrate was not detached and neutral; a code enforcement officer is not an "officer" under MCL 780.654; and law enforcement violated the knock-and-announce rule.

First, the record demonstrated that the magistrate was duly appointed and provided the requisite bond; thus, all statutory requirements were met. MCL 600.8501(2) provides in pertinent part:

> Before a person assumes the duties of the office of magistrate in a district of the third class, the appointment of that person as a district court magistrate shall be subject to approval by the governing body or bodies of the district control unit or units which, individually or in the aggregate, contain more than 50% of the population of the district.

At the preliminary hearing, the district court indicated that there are four funding units, which must meet the requisite 50 percent requirement, and the magistrate was approved by more than 50 percent of those requisite units. As such, the district court concluded that the magistrate was duly appointed and authorized to issue the search warrant. Subsequently, the circuit court denied defendant's motion to dismiss, concluding that the district court's research demonstrated that the magistrate was duly appointed. Further, the circuit court noted that "defendant's own evidence contradicts" his argument that the magistrate did not post bond.

The 48th District consists of the cities of Birmingham, Bloomfield Hills, Sylvan Lake, Keego Harbor, and Orchard Lake Village and the townships of Bloomfield and West Bloomfield. MCL 600.8123(7). The record contained an administrative order of the 48th District stating that the magistrate in question was appointed with "the approval of all of the Court's District Funding Units." Thus, the record demonstrates that the magistrate was duly appointed pursuant to MCL 600.8501(2).

As discussed previously, the record also demonstrated that the 48th District Court posted bond for the magistrate in question. MCR 8.204 provides that magistrates "must file with the chief judge a bond approved by the chief judge." Thus, the magistrate satisfied any statutory bond requirement. On this record, we conclude that the magistrate complied with the statutory requirements.

Second, defendant's assertion that the magistrate was not authorized to issue search warrants lacks record support. A district court magistrate has jurisdiction to issue search warrants when authorized to do so by a district judge. MCL 600.8511(f). Magistrates exercise only those duties expressly authorized by the chief judge of the district. MCR 4.401(B). The current state of the law allows for a blanket authorization for a magistrate's issuance of search warrants:

> Allowing a blanket authorization for the issuance of search warrants does not eliminate any exercise of discretion by district court judges. In this case, the judges made the initial decision whether any one or more of their magistrates would be authorized to issue search warrants. The magistrates selected were not given the unlimited discretion to issue search warrants that they had in fixing bail and bonds under [MCL 600.8511(c)]; they could issue search warrants only if the judges of the district court had exercised their discretion giving them the authority. [*People v Paul*, 444 Mich 949; 511 NW2d 434 (1994), adopting *People v Paul*, 203 Mich App 55, 66; 512 NW2d 20 (1993) (Kelly, J., dissenting).]

Generally, the defendant has the burden of proof on a motion to suppress. *People v Robinson*, 344 Mich 353, 364; 74 NW2d 41 (1955) (a defendant asserting that evidence was obtained illegally has the burden of establishing lack of authority and consequent illegality). Defendant cites nothing in the record to support his assertion that the magistrate was not authorized to issue the search warrant. Defendant asserts that he "was told, over the phone, by one of the clerks working the front desk that [the magistrate's] authorization was not documented because the magistrate is authorized under State Statute." This assertion, without more, is meaningless. Thus, on this record, we conclude that there was no evidence that indicated the magistrate acted without direction of the district court in issuing the search warrant. See MCL 600.8511(f). There was no mistake by the trial court under the "clearly erroneous" standard. *People v Martinez*, 192 Mich App 57, 62; 480 NW2d 302 (1991).

Third, the record fails to support defendant's contention that the magistrate was not detached and neutral. The United States Supreme Court held that a magistrate must meet two requirements: (1) the magistrate must be neutral and detached; and (2) the magistrate must be capable of determining whether probable cause exists for the requested arrest or search. *Shadwick v City of Tampa*, 407 US 345, 350; 92 S Ct 2119; 32 L Ed 2d 783 (1972). As a general proposition, a magistrate issuing a warrant must be detached and neutral. *Connally v Georgia*, 429 US 245, 246; 97 S Ct 546; 50 L Ed 2d 444 (1977) (a magistrate cannot have a financial stake in the issuing of warrants). This Court held that "the magistrate (or judge) must disqualify himself if he had a pecuniary interest in the outcome." *People v Lowenstein*, 118 Mich App 475, 484; 325 NW2d 462 (1982). Defendant must "show bias or prejudice in fact" in order to disqualify a magistrate. *People v Karmey*, 86 Mich App 626, 635-636; 273 NW2d 503 (1978).

Defendant asserts that the magistrate was not detached and neutral in this case, because her law firm had a pending foreclosure proceeding against defendant. However, defendant merely offered the magistrate's entry in the Michigan State Bar Member Directory, which indicated she was a member of the law firm, as well as the certificate of service, which indicated that law firm was counsel for the party instituting the foreclosure proceedings against him. Once again, defendant has not cited any authority to support his arguments. Once again, we find this argument has no merit. Defendant has not demonstrated that the magistrate in question was involved in the foreclosure action or how her involvement in that action would prejudice defendant in the instant action. Thus, defendant failed to "show [the] bias or prejudice" necessary to disqualify the magistrate. See *id*. at 635-636.

Fourth, defendant advances a form over substance argument by contending that the search warrant was invalid, because it was directed "TO THE SHERIFF OR ANY OFFICER OF SAID COUNTY OR TOWNSHIP." Defendant argues that the search warrant was invalid, because MCL 780.654 provides that a search warrant "shall be directed to the sheriff or any peace officer." Thus, defendant objects to the omission of the word "peace" from the search warrant. The trial court ruled that "[t]here is no indication in the statute that the legislature intended that this type of defect result in suppression," in its order denying defendant's motion to dismiss. We conclude that the trial court's ruling was not clearly erroneous, because such a defect is not sufficient to invalidate a search warrant. See *People v Fetterley*, 229 Mich App 511, 542; 583 NW2d 199 (1998).

Fifth, defendant offered no evidence that law enforcement violated the knock-and-announce rule. MCL 780.656 provides:

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant. [See, also, *People v Howard*, 233 Mich App 52, 54-55; 595 NW2d 497 (1998).]

Under the knock-and-announce statute, police must allow a reasonable time for the occupants to answer the door following the announcement. *Fetterley*, *supra* at 521. In this case, the code enforcement officer testified that he knocked on the door several times and called out for anyone inside to answer the door, but there was no answer. The water department supervisor testified that in addition to the code enforcement officer and himself, there were also two other water department workers; three police officers; and two firefighters at the scene when the code enforcement officer executed the search warrant. Significantly, those witnesses testified that they smelled gas emanating from the front of the residence. Firefighters accessed the residence through a second-story window. It can be reasonably inferred from the record that minutes passed from the time the code enforcement officer initially knocked on the door to when the firefighters ultimately accessed the residence through a second story window via a ladder.

Defendant asserts that law enforcement could not comply with the knock-and-announce rule because he was not present. Thus, defendant contends that "it was impossible" for him to receive any notice. Under the circumstances, this Court concludes that the law enforcement officers waited a reasonable time before entering the residence. See *id*. at 521-524. Under *Fetterley*, the key to the knock-and-announce application was the announcement by law enforcement and the amount of time before entering. *Id*. at 522-523. The law enforcement witnesses in *Fetterley* did not offer any testimony regarding the whereabouts of the defendants. *Id*. Thus, it can reasonably be inferred that a resident's physical location in the residence is not relevant to the applicability of the knock-and-announce rule. Further, our Supreme Court held that a violation of the knock-and-announce rule does not result in the exclusion of evidence, because the searching and seizing of the evidence was independent of failure to comply with the "knock and announce" statute. *People v Stevens*, 460 Mich 626, 646; 597 NW2d 53 (1999). As such, we conclude that the trial court's ruling based on this argument was not clearly erroneous.

In reaching our conclusion, we note that defendant does not refute the witnesses' testimony regarding the emanation of gas from inside the front of the residence. See *Howard*, *supra* at 55 (failure to comply with the knock and announce statute may be excused if exigent circumstances existed, including when lives would be endangered by the delay). Also, law enforcement need not comply with the knock-and-announce rule if it would be a useless gesture. *Stevens*, *supra* at 632. Such would be the case here because no one was home.

Next, defendant argues that he was denied his right to a speedy trial. We disagree. Whether a defendant has been denied his right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). A trial court's factual findings are reviewed for clear error, while constitutional questions of law are reviewed de novo. *Id*. Both the United States and the Michigan Constitutions guarantee a defendant the right to a speedy trial. US Const, Am 6; Const 1963, Art 1 Sec 20. In determining whether a defendant has been denied his right to a speedy trial, the pertinent period commences on the date of the defendant's arrest. *People v Cleveland Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). In

determining whether a defendant has been denied his right to a speedy trial, a court must consider: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Id*. at 261-262. If the delay is 18 months or more, prejudice is presumed and the prosecutor has the burden to show that there was no injury. *Id*. at 262. When the delay is less than 18 months, the defendant must prove prejudice. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003).

First, the length of delay must be determined. In this case, the record does not indicate when defendant was arrested; however, the lower court file contained an arrest warrant, which was dated September 28, 2004, and defendant was arraigned on September 30, 2004. Thus, more than nine months (287 days) passed between the issuance of the arrest warrant and the commencement of the trial. The length of the delay is not determinative of a speedy trial claim. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). The delay in this case does not approach the outer limits of other delays that this Court has addressed. See, e.g., *Id*. at 111 (27 months); *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994) (54 months); *People v Missouri*, 100 Mich App 310, 319-320; 299 NW2d 346 (1980) (31 months); *People v Cutler*, 86 Mich App 118, 126; 272 NW2d 206 (1978) (37 months); *People v Smith*, 57 Mich App 556, 567; 226 NW2d 673 (1975) (19 years).

Second, the reason for the delay must be considered. The time needed to adjudicate defendant's motions is charged to defendant. *Gilmore*, *supra* at 461. Witness unavailability does not count against either party. *People v Sickles*, 162 Mich App 344, 358; 412 NW2d 734 (1987). Delays resulting from docket congestion are attributed to the prosecution, but are assigned only minimal weight. *Cleveland Williams*, *supra* at 263. The record refutes defendant's contention that the prosecution was responsible for all of the delays. In this case, defendant moved to dismiss, which caused considerable delay. The trial court adjourned a trial date due to witness unavailability. On this record, there was no evidence that the prosecution was responsible for any of the delays, other than the docket congestion, which is assigned only minimal weight. See *id*.

Third, defendant asserted his right to a speedy trial in his April 8, 2005, motion. Thus, he asserted his right to a speedy trial more than six months (192 days) after the arrest warrant was issued. The trial commenced approximately three months thereafter.

Fourth, the prejudice to defendant must be determined. A defendant may experience two types of prejudice: (1) prejudice to his person, and (2) prejudice to the defense. *Id*. at 264. The record contains no evidence of personal prejudice. However, prejudice to the defense is the more serious concern. *Id*. Defendant argued that his defense was prejudiced because he was facing eviction, and he would no longer have access to the primary piece of evidence in this case, i.e., the residence. The trial court ruled that defendant was able to preserve evidence through testimony and photographs, and it denied defendant's motion to reconsider. The record does not reflect that defendant's defense suffered as a consequence.[1] There was no evidence that any

[1] The record from the jury trial was incomplete. However, the excerpt transcripts demonstrated that defendant engaged in a vigorous cross-examination of witnesses. It is unknown whether defendant presented a case-in-chief.

witnesses were unable to testify due to the delay. Further, the record demonstrated that defendant was able to obtain videotape of the residence for his defense. On this record, we conclude that defendant was not denied his right to a speedy trial, because the trial court's ruling was not clearly erroneous. See *Gilmore, supra* at 459.

Next, defendant argues that he was denied the constitutional right of due process due to prosecutorial misconduct. The record does not support defendant's allegations of prosecutorial misconduct. Thus, we find that defendant was not denied a fair and impartial trial. See *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Finally, we note that defendant raised a number of other arguments that were not in his statement of issues presented. Defendant asserts that he was entitled to a new trial based on newly discovered evidence; he was denied a fair trial due to prejudicial comments by the trial court; the conditions of his probation violated his Second Amendment rights; and the district court testified contrary to MRE 605 at the preliminary examination. These arguments are not preserved for appellate review. See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nevertheless, these arguments have no merit.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly